United States Court of Appeals

for the Second Circuit

APPELLEE'S BRIEF

74-1304

To be argued by
PAUL B. SHERMAN

United States Court of Appeals

Docket No. 74-1304

FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA,

Appellee,

—against—

ROBERT J. CARROLL and DOROTHY CARROLL,

Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

BRIEF FOR THE APPELLEE

EDWARD JOHN BOY
United States Attorney
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PAUL B. SHERMAN,
T. BRADFORD SPIELMAN,
Assistant United States Attorneys,
Of Counsel.

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Preliminary Statement

Robert J. Carroll and Dorothy Carroll appeal from an order of the United States District Court for the Eastern District of New York (Costantino, *J.*), entered January 3, 1974, which order denied appellants' motion pursuant to Rule 60(b) of the Federal Rules of Civil Procedure to vacate and set aside a consent judgment entered six years before, upon the order of Judge Zavatt, which adjudged that appellants owed $23,965.36 plus interest to the United States of America in back taxes and penalties.

On this appeal, appellants' sole contention is that the District Court erred in construing the motion as one falling within the fraud subdivision of Rule 60, i.e. (b)(3), and, therefore, barred by the one year limitation period. Appellants urge that they have alleged facts falling within the "other reason" provision in subdivision (b)(6) and, thus, are not time barred or, alternatively, that the limitation

period in the Rule should be tolled because the alleged fraud of the Government was not discovered by them until last year, shortly before they moved for relief.

Statement of the Case *

(1)

The within case was commenced in March of 1965, more than nine years ago, when the Government sued the appellants for a total of $25,635.46 in back taxes, interest and fraud penalties. (See Summons and Complaint, Government's Appendix, A. 4; A. 6). The tax years involved were 1949 through 1952. The I.R.S. assessments thereon were made, apparently, with the appellants' consent in 1957 and 1959. Issue was joined in July of 1965 with the service of appellants' answer. (See Answer, Government's Appendix, A. 11.) Appellants, who were represented by counsel at the time, asserted then that appellant Robert Carroll had been pressured by the Tax Court into agreeing to the assessment and moreover, that

> ". . . upon the representations of certain Revenue Officers and Agents, defendant Robert J. Carroll consented in writing to the said assessments after being

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* The facts of the instant case appear in the District Court file which includes the three affidavits submitted in connection with the motion filed below. The Government's Appendix herein includes copies of the relevant court documents. The affidavits are also reproduced in the Government's Appendix. The Statement of the Case herein has been gleaned from the foregoing materials, all of which were before the District Court. No attempt has been made to incorporate or refute the host of additional allegations which appellants—who appear pro se—have placed in their brief before this Court. Finally, the Government has referred to certain court documents in a prior action brought by the appellants (Carroll v. Internal Revenue Service, et al., 64 C 287; E.D.N.Y.) which was dismissed by the District Court in 1964 (see Memorandum and Order, Dooling, *J.*; Government's Appendix, A. 46).

assured by said agents that an offer in compromise would be considered. Defendants subsequently submitted an offer in compromise which was never accepted by the Internal Revenue Service.

That solely by reason of the aforesaid fraudulent representations made by said agents of the Internal Revenue Service, which defendants believed in good faith to be true, did defendants consent to the aforesaid assessments and solely by reason of the aforesaid duress did defendant Robert J. Carroll cooperate with the United States Attorney in the Tax Court of the United States by withdrawing his defense against the assessments.

SIXTH: That the waivers referred to in paragraph XI of the complaint herein were executed by defendants solely to induce the Internal Revenue Service to give consideration to another offer in compromise, which offer was submitted and subsequently rejected" (Answer, Government's Appendix, A. 13).

In addition, appellants' urged at that time that waivers by appellant Robert Carroll of the statute of limitations were similarly obtained by fraud, duress, etc. (See Answer, Government's Appendix, A. 14).

The Note of Issue and the Statement of Readiness were filed on December 14, 1965. The trial began two years later. Thereafter, following nearly three full days of trial, the parties entered into a consent judgment which, in columnar fashion, set forth appellants' total tax liability at $23,965.36. The judgment was duly executed by all parties, including counsel to appellants. Judge Zavatt made the stipulation and consent a judgment of the Court. The document was entered on December 21, 1967 (See Judgment by Consent, Government's Appendix, A. 19-A. 20).

(2)

Appellant Robert Carroll, in his affidavit in support of the motion below to vacate, appears to have stated that he signed the consent judgment with the expectation that he would not have to pay the amount specified in it. Thus, he relates, in his affidavit, a meeting with representatives of the Government (a meeting at which his attorney was seemingly not present) held just prior to the signing of the consent judgment. According to appellant Robert Carroll, he was told that

> ". . . the best way to arrange a settlement was through an 'Offer in Compromise' and an 'Offer in Compromise' could only be made if the amount assessed was agreed to." (Carroll Affidavit of November 5, 1973, page 2, Government's Appendix, A. 24).

In early January, 1968, following entry of the judgment, according to appellant Carroll, he visited with Stuart Goldberg, an Assistant United States Attorney in the Fines and Claims Division. In somewhat of a contradiction, appellant Carroll stated in his affidavit that he visited Goldberg, ". . . in an effort to determine what would be a fair offer in settlement of the agreed to assessment" (Carroll Affidavit of November 5, 1973, page 2; Government's Appendix, A. 24-A. 25). Appellant makes no mention of that initial visit to the Fines and Claims Division as having been in the context of an installment arrangement to ease his anticipated payment of the amount of the consent judgment. Nevertheless, he does state that Goldberg checked his financial condition and had concluded that he, Carroll, ". . . had no means with which to pay." (*Id.*, at page 2; Government's Appendix, A. 25).

Appellant Carroll states that Goldberg eventually surmised that it would be "acceptable" if Carroll paid the Government $1,200 in full settlement of the judgment. Therefore, according to Carroll, he sent a certified check

for that sum to Goldberg on February 26, 1968. Appellant apparently anticipated, after allegedly receiving assurances from Goldberg to be "patient," that his "offer in compromise" would finally end the matter. His patience, however, ran out a year later when, not having heard from Goldberg, he once again visited the Fines and Claims Division. Goldberg, however, was not there. Instead, Assistant United States Attorney Louis Rosenthal, Goldberg's apparent replacement, spoke with appellant Carroll. After Rosenthal advised appellant that his "offer" and certified check had not been acted upon, appellant located Goldberg who was then working at he SEC's New York Office. Suffice it to say that Goldberg had quite forgotten appellant. (*Id.*, at page 3; Government's Appendix, A. 25-A. 26).

Shortly after appellant's visit with Rosenthal, he received a letter from him returning the certified check and advising that: "After careful consideration your offer to compromise the . . . claim is hereby rejected." (*Id.*, at page 4; Government's Appendix, A. 27).

Over the course of the next two and a half years (1969-1971), appellant visited the Fines and Claims Division "on many occasions." Finally, on October 18, 1971, following a conversation with Assistant United States Attorney Thomas A. Illmensee, appellant once more sent the Government a certified check ($2,000) and another offer of compromise. Appellant states that Illmensee "indicated" that the offer would be acceptable. (*Id.*, at page 4; Government's Appendix, A. 27).

In January of 1973, more than a year later, appellant went to see Assistant United States Attorney Joseph Rosenzweig, Chief of Fine and Claims, to inquire about his latest offer of compromise. That offer, also, had not been favorably received and when appellant persisted in gaining an explanation for what he fervently believed to be the high handedness of the Government, Rosenzweig said:

"Mr. Carroll, do you know what a stand committed fine means [?]" (*Id.*, at page 4; Government's Appendix, A. 28). Appellant knew and said he did.

Shortly thereafter, by letter dated February 13, 1973, appellant was advised by the United States Attorney's office as follows:

> Please be advised that we have been informed by the Department of Justice that they would consider acceptable a cash offer of $10,000.00 and a collateral agreement.
>
> If this is acceptable to you, please forward to us a certified check in that amount, made payable to the "treasurer of the United States", plus the collateral agreement. (See Government's Appendix, A. 31).

Appellant, in his affidavit, states the foregoing demand for the "full amount of the judgment" was "in direct violation of the suggestion of Judge Zavatt." (*Id.*, at page 5; Government's Appendix, A. 28).*

(3)

The Government's opposition to the assertions in appellants' moving affidavit came in the form of a succinct affi-

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* The final segment of appellant's moving affidavit deals with an experience he had in the final stages of this matter and which—one hazzards a guess—finally prompted the within suit. In August of last year, a financial statement was required of appellant. When he balked, Assistant United States Attorney I. Bradford Spielman promised him that, if he gave such a sworn statement, no income execution would be filed against Mrs. Carroll for a period of 90 days. Two days later, however, an income execution was served on Mrs. Carroll's employer. The mistake was corrected, however, after appellant complained (Carroll affidavit of November 5, 1973; pages 5-6; Government Appendix A. 28-A. 29).

davit of Assistant United States Attorney I. Bradford Spielman. No attempt was made to counter appellants' numerous assertions and innuendos of shoddy treatment by Assistant United States Attorneys. Spielman simply added that:

> "Since the entry of the judgment, the defendants have promised to make monthly payments, but none has been received since July 15, 1969. The current balance due on this judgment is $23,825.36, plus interest. The defendants made several settlement offers which were rejected for insufficiency." * (Spielman Affidavit of November 16, 1973, at pages 2-3; Government's Appendix, A. 34).

(4)

Appellant Carroll filed a reply affidavit (see Carroll Affidavit, dated November 26, 1973; Government's Appendix, A. 38-A. 40). Stripped of its legal contentions, that affidavit is noteworthy insofar as it contains the following two statements:

> The Government's contention that the motion to vacate is barred because it is not timely is inoperative

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* On January 15, 1968, appellant Carroll agreed to pay $20 per month starting February 1, 1968. Since that date the following payments have been received.

Date	*Amount*
2/27/68	$ 20.00
4/29/68	10.00
5/29/68	10.00
6/27/68	$ 20.00
9/ 3/68	10.00
12/ 2/68	10.00
2/28/69	$ 20.00
7/15/69	40.00
Total	$140.00

The balance due at the present time is $23,825.36 plus interest.

because they failed to act for over one (1) year on the original offer of a settlement as suggested by Judge Zavatt. As a matter of fact the Government never made any effort to comply with the order of Judge Zavatt to effect a settlement until February 13, 1973 at which time they demanded the full amount of the judgment in direct violation of the Judge's order.

* * * * *

The last sentence of paragraph 6 of the Government's affidavit states "Nor is the United States under any obligation to accept any offer to compromise the judgment". This statement among others is further proof that the Government never intended to act in good faith in connection with a settlement as suggested and ordered by Judge Zavatt. (*Id.*, at p. 1; Government's Appendix, A. 38-A. 39).*

(5)

On January 3, 1974, following oral argument on the motion, the District Court dismissed appellants' motion. The District Court determined that, to the extent that the motion was based upon subdivision (b)(3) of Rule 60, the fraud subdivision, it was untimely. As to the alternative ground asserted for the motion; i.e., the "other reason"

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* Appellants had made essentially the same kind of claim in their action commenced in the District Court in 1964 (64 C 287; E.D.N.Y.—See docket sheets, Government's Appendix, A. 44-A. 45). In that action, appellants sought to compel the Government to accept $500 in compromise of the assessments. Judge Dooling dismissed the complaint, upon the Government's motion, noting: "The decision to accept or reject a compromise offer by its nature involves the discretion of administrative authority and can not be compelled by any action for a mandatory injunction." (See Memorandum and Order, 64 C 287 at page 2; Government's Appendix, A. 47). Judge Dooling further noted that: "It does not appear that plaintiffs wish to amend, or indeed, could amend successfully . . ." (*Id.*, at page 4; Government's Appendix, A. 49).

provision in subdivision (b)(6) of Rule 60, the District Court determined that the motion was also untimely and that, in any event, ". . . the motion is in reality based on a Rule 60(b)(3) reason" (Memorandum and Order, Government's Appendix, A. 43).

ARGUMENT

The District Court Properly Denied Appellants' Motion.

Asserting in his brief (page 4) that he "would never have agreed to this judgment had [he] known the Government would have acted as they did," appellant Carroll urges that he was the victim of circumstances cognizable under Rule 60(b)(3) or (b)(6) of the Federal Rules of Civil Procedure. The Government believes that, upon the record, no valid claim for relief has been set forth.

Appellants' asserted basis for relief is no more than a rehashing of the claim they pressed in their 1964 action to compel the Internal Revenue Service to accept $500 in satisfaction of the more than $20,000 that they owed in taxes. See *Mastini* v. *American Telephone and Telegraph Company,* 369 F.2d 378, 379 (2d Cir. 1966), *cert. denied,* 387 U.S. 933 (1967). At that time, Judge Dooling, noting the prerogative of the Government to reject that offer, dismissed their complaint. (See Memorandum and Order [64 C 287]; Government's Appendix, A. 47). Though Judge Dooling noted, in 1964, that appellants were in no apparent position to amend their complaint, they have, in effect, sought to amend it by their motion in the District Court to vacate the consent judgment. There is, however, no credible suggestion in the record that the consent judgment was anything less than, nor more than what it pur-

ported to be.* It was, quite simply, an informed consent. The ever-widening assertions in appellants' papers that the judgment was procured deceitfully do not meet the burden required of movants under Rule 60(b).

In sum, appellants, who paid but $140 in 1968 and 1969 upon the total judgment, are hardly in a position to claim that the Government's rejection of their last $2,000 offer amounts to bad faith, let alone a reflection of an underlying fraud or misrepresentation. Compare, *Serzysko* v. *Chase Manhattan Bank*, 461 F.2d 699, 701-703 (2d Cir.), *cert. denied*, 409 U.S. 883 (1972). In addition, appellants' motion is untimely and utterly devoid, as it should not be, of any meritorious defense to the Government's claim for taxes. See, *Wilkin* v. *Sunbeam Corporation*, 466 F.2d 714, 717 (10th Cir. 1972), *cert. denied*, 409 U.S. 1126 (1973). There is nothing in the record to suggest other than that a retrial "would reach a like result to that already achieved below." *Bowles* v. *J. J. Schmitt & Co.*, 170 F.2d 617, 620 (2d Cir. 1948).

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* According to the complaint, the tax assessments totaled $25,635.46. The consent judgment, however, speaks of a total debt of $23,965.36. The difference arose, in part, from an apparent adjustment in the assessment for the 1949 and 1952 tax years. Thus, the complaint, in paragraph VII states a total liability of $7,813.30 for 1949 whereas the judgment has the sum of $7,181.30. For 1952, the complaint (paragraph X) has a total liability of $2,755.68, whereas the judgment lists the amount at $2,722.58. Of course, those two adjustments account for only $665.10. The remaining difference seems to have resulted from the correction of mathematical error in the complaint.

CONCLUSION

The Order of the District Court Should be Affirmed.

Respectfully submitted,

May 15, 1974

EDWARD JOHN BOYD V,
United States Attorney,
Eastern District of New York.

PAUL B. BERGMAN,
I. BRADFORD SPIELMAN,
Assistant United States Attorneys,
Of Counsel.

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Form No. USA-52a-6a
(Rev. 1-29-71)

Carroll

AFFIDAVIT OF MAILING

STATE OF NEW YORK
COUNTY OF KINGS
EASTERN DISTRICT OF NEW YORK, ss:

DEBORAH J. AMUNDSEN, being duly sworn, says that on the 17th day of May 1974, I deposited in Mail Chute Drop for mailing in the U.S. Courthouse, Cadman Plaza East, Borough of Brooklyn, County of Kings, City and State of New York, a X two copies of the brief for the appellee of which the annexed is a true copy, contained in a securely enclosed postpaid wrapper directed to the person hereinafter named, at the place and address stated below:

Mr. Robert J. Carroll
3111 Aurelia Court
Brooklyn, New York 11210

Sworn to before me this
17th day of May 1974

Sylvia E. Morris

SYLVIA E. MORRIS
Notary Public, State of New York
No. 24-4503861
Qualified in Kings County
Commission Expires March 30, 19 75

Deborah J. Amundsen

DEBORAH J. AMUNDSEN

SIR:

PLEASE TAKE NOTICE that the within will be presented for settlement and signature to the Clerk of the United States District Court in his office at the U. S. Courthouse, 225 Cadman Plaza East, Brooklyn, New York, on the ____ day of _____, 19____, at 10:30 o'clock in the forenoon.

Dated: Brooklyn, New York,

_____, 19____

_____

United States Attorney,
Attorney for _____

To:

_____

_____

_____

Attorney for _____

SIR:

PLEASE TAKE NOTICE that the within is a true copy of _____duly entered herein on the ____ day of _____ _____, in the office of the Clerk of the U. S. District Court for the Eastern District of New York,

Dated: Brooklyn, New York,

_____, 19____

_____

United States Attorney,
Attorney for _____

To:

_____

_____

_____

Attorney for _____

_____ Action No._____

UNITED STATES DISTRICT COURT
Eastern District of New York

—Against—

_____

United States Attorney,
Attorney for _____
Office and P. O. Address,
U. S. Courthouse
225 Cadman Plaza East
Brooklyn, New York 11201

Due service of a copy of the within _____ _____is hereby admitted.

Dated: _____, 19____

_____

Attorney for _____

FPI-LC-5M-8-73-7355